

Does TTIP need investment protection provisions?

Requirements for Substantive Investment Protection and for Investor-State Dispute Settlement (ISDS)

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Executive Summary

Investment protection provisions in international agreements contain both the substantive law and procedural rules on implementation. Substantive investment protection covers, in particular, protection against expropriation, national treatment and most-favoured-nation (MFN) treatment. Normally, investor-state arbitral tribunals are set up for the purposes of implementation.

As there is no complete draft of TTIP's chapter on investment protection, the following analysis will refer to the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada which is said to serve as a blueprint for TTIP.

Substantive provisions

No need for protection against expropriation in TTIP

- ▶ Protection against expropriation for foreign investors can give rise to two problems:
- ▶ Firstly, protection against expropriation can make state regulation unreasonably difficult. This can be taken into account - as in CETA - by permitting the regulation insofar as it is non-discriminatory, serves legitimate public welfare objectives and is not manifestly excessive. There will then be no risk of regulatory chill.
- ▶ Secondly, protection against expropriation can lead to distortions of competition if foreign investors are compensated for expropriation whilst domestic investors are not (discrimination against local nationals). In Germany, this issue can occur in particular relating to indirect expropriations which, under German law, must either be contested or accepted; compensation for domestic investors is, in principle, excluded.
- ▶ **cepRecommendation:** Special protection against expropriation for foreign investors should not be included in TTIP. Instead, the protection against expropriation available to domestic investors in the EU and the U.S. should also be consistently granted to foreign investors.

Include national treatment in TTIP - as in CETA

- ▶ National treatment means that the foreign investor must be treated just like a domestic investor. Without it, domestic law may withhold rights from foreign investors which it grants to domestic investors, and foreign investors would be at a competitive disadvantage.
- ▶ National treatment, as provided for in CETA, does not amount to full equality between foreign and domestic investors. In fact, CETA contains exceptions which allow unequal treatment in certain cases, e.g. for reasons of health protection.
- ▶ **cepRecommendation:** The provisions contained in CETA relating to national treatment, on the one hand, ensure a level playing field for domestic and foreign investors and, on the other, do not excessively restrict state regulatory capability. Corresponding provisions in TTIP are therefore recommended.

Include most-favoured-nation (MFN) treatment in TTIP - as in CETA

- ▶ MFN treatment means that any foreign investor may rely on the most favourable provisions which the host state has agreed with any third country. Thus the investor can "cherry pick" the most favourable legal provisions.
- ▶ CETA's exemptions to national treatment also apply to MFN treatment so that here too, equal treatment - in this case with respect to investors from third countries - is not strict.
- ▶ **cepRecommendation:** CETA's MFN treatment largely avoids discrimination between foreign investors without excessive restriction on state regulatory capability. Corresponding provisions in TTIP are therefore recommended.

Procedural rules

International court instead of private arbitral tribunal

- ▶ Private investor-state arbitration means that, in the event of investment protection disputes the host state submits to the judgement of a private third party.
- ▶ As a general rule, countries comply with the arbitral awards without objection. There are few if any grounds for non-enforcement. Thus, there is significant need for justification as to why this de facto sovereign power should be entrusted to private individuals. Alleged neutrality or efficiency are insufficient grounds because they can be achieved by other means.
- ▶ **cepRecommendation:** In order to implement the substantive investment protection provisions, an international court is preferable to the private arbitration procedure which currently exists - and which is also provided for by CETA.

Independent judges and appeals system

- ▶ The arbitrators have an interest of their own in arbitration proceedings. The more often they rule against companies, the less incentive companies will have to bring arbitration proceedings and thus the fewer arbitration proceedings there will be. This could have an impact on the tendency of arbitral awards - in favour of the claimant company.
- ▶ The lack of an appellate mechanism for private arbitral tribunals is problematic in two respects: Firstly, there is no correction of errors by an appeal tribunal. Secondly, the coherence of the case law suffers as a result because there is no superior instance to safeguard the uniformity of case law and to develop the law.
- ▶ **cepRecommendation:** There should in future be genuine judicial dispute settlement by judges who must be independent and in particular who must be remunerated irrespectively of the individual cases. An appeals system is essential for legal certainty.

The investor himself should be able to claim

- ▶ The argument that giving the investor a right of action depoliticises disputes and should therefore be supported, is double-edged. If this right of action itself becomes politicised, this argument comes to nothing. The politicisation will then just be shifted: it will no longer take place between the states but between the foreign investor and the host state.
- ▶ The decentralised and thus more efficient enforcement of the substantive standards of protection, however, militates in favour of giving the investor a direct right of action: the circuitous route whereby a claim is made by the home state against the host state will no longer be necessary.
- ▶ **cepRecommendation:** On balance, the decentralised enforcement of the substantive standards of protection by the investor himself is more efficient. We therefore advocate giving the investor a right of action under TTIP.